

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-710

COMMONWEALTH

VS.

CYNTHIA KENT.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Cynthia Kent, was convicted of operating while under the influence of intoxicating liquor, second offense, in violation of G. L. c. 90, § 24 (1) (a) (1).¹ On appeal, she claims her trial was improperly prejudiced by (1) the introduction of so-called "refusal" evidence, (2) an improper question asked by the Commonwealth during her cross-examination, (3) and certain statements made by the Commonwealth during closing argument. We affirm.

Background. At approximately 1:10 A.M. on September 15, 2016, Officer Timothy Webster of the Easton Police Department observed a car pull into and travel down the wrong traffic lane for roughly fifty feet before accelerating to a high rate of

¹ The defendant also was found responsible on the civil infraction of speeding, and the finding was filed.

speed. Webster followed the car in his cruiser and observed the car cross over the double yellow line with both driver's side tires. After he turned on the cruiser's blue police lights, the car continued to travel at approximately seventy miles per hour or more. The speed limit for the road was forty miles per hour. Eventually, the car pulled over into a far left turn lane of an intersection and parked. For safety purposes, with his public address system, Officer Webster told the driver to pull over to the right side of the road. The driver did not. Officer Webster then approached the operator's window, which was "cracked" open slightly, and instructed the driver whom he identified as the defendant, to pull the car off the road to a side street for her safety. The defendant complied.

Officer Webster then approached the driver's window again. This time he inquired as to "her manner of operation, why she was traveling so fast, why she crossed over [the double yellow line], [and] why she was traveling in the wrong lane." To all of those questions, the defendant replied that she was not aware she had done anything wrong. The officer observed that the defendant's eyes were glassy and very bloodshot, and she had trouble focusing on him. Webster also smelled the odor of alcohol emanating from her mouth. She denied having had anything to drink that night. Officer Webster asked the defendant if she knew where she was, and the defendant paused

for roughly ten seconds before saying she was in Easton. When asked if she had any medical conditions, she denied that she did.

Once a second officer arrived, the defendant was asked to get out of the car for field sobriety tests. When the defendant got out, she appeared "unsteady on her feet" and at one point stumbled backwards until she was leaning with her back against the car. Officer Webster instructed her on how to perform the nine-step walk-and-turn field sobriety test. He told her to start with her left foot on the white line and to walk heel-to-toe with her arms by her sides. Before he could finish the instructions, the defendant began the test of her own accord. She immediately put her arms out, missed heel-to-toe, and stepped off the line. She made roughly four attempts in this manner.

Officer Webster then instructed her to stay in the starting position until he told her otherwise. After he completed the instructions, he told her to start, and she walked with her arms straight out. Her feet "stagger[ed]" the sides of the white line and were not touching heel-to-toe. She audibly counted twelve steps and failed to turn and come back.² Officer Webster

² The other officer at the scene asked the defendant how many steps she was supposed to take, and the defendant replied, "Twelve."

asked whether she had medical conditions preventing her from walking in a straight line, including heel, ankle, knee, or hip problems, and she denied that she did. When asked if she wanted to attempt the test for a sixth time, she began to cry.

Webster then asked her to perform the one-leg stand field sobriety test. For the third time, he asked whether she had any medical conditions. This time, she informed him that she could not perform the exercise because of her plantar fasciitis. Based on the "field sobriety exercises, [his] observations, and her manner of operation," Officer Webster formed the opinion that she was under the influence of intoxicating liquor; he arrested and transported her back to the police station for booking.

At the station, the defendant still appeared unsteady on her feet and continued to smell of alcohol. Officer Webster described her behavior during the "entire" booking process as "extremely uncooperative." She refused to sign documents presented to her. As Officer Webster attempted to read the defendant her rights, she would speak over him by reciting the Lord's Prayer and the "Hail Mary." The defendant sometimes mixed up lines of the prayers. There were long portions of time where she would remove herself from her chair to the floor. During the fingerprinting, she was leaning against Officer

Webster to maintain her balance. In addition, "[s]he was refusing to answer anything."³

The defendant was charged with operating while under the influence of alcohol, second offense, and negligent operation of a motor vehicle, as well as the civil infractions of a marked lanes violation and speeding in violation of a special regulation. On July 31, 2017, a bench trial was conducted and the defendant was found guilty of operating while under the influence, and found responsible for speeding. The defendant was found not guilty of negligent operation and not responsible for the marked lanes violation. She now timely appeals.⁴

Discussion. The defendant claims that a new trial is warranted on the cumulative basis of three errors. We address each in turn. Because the defendant's counsel failed to object to any of the three errors at trial, each of the defendant's claims are reviewed for a substantial risk of a miscarriage of justice. Commonwealth v. Gibson, 82 Mass. App. Ct. 834, 837 (2012).

1. Refusal evidence. First, the defendant argues that the admission of her refusal to (1) perform a field sobriety test

³ The booking video recording was not provided in the record on appeal.

⁴ On the same day she filed a notice of appeal, she filed a motion to stay her sentence. The trial judge denied that motion.

due to a medical condition and (2) answer booking questions constituted refusal evidence. Refusal evidence, which is inadmissible, arises when a defendant is compelled "to choose between two equally unattractive alternatives: 'take the test and perhaps produce potentially incriminating real evidence; refuse and have adverse testimonial evidence used against him at trial.'" Commonwealth v. McGrail, 419 Mass. 774, 780 (1995).

We disagree that the first instance constituted refusal evidence. With regard to the sobriety test, Officer Webster asked the defendant whether she had a medical condition that would prevent her from completing a second sobriety test, and she replied that she had plantar fasciitis, which was true and supported by medical records. Although a fact finder could infer some level of consciousness of guilt from the defendant's actions given that the officer asked her the same question prior to the previous sobriety test and she reported no ailments, the defendant's assertion of a real medical condition does not create the quandary warned about in Opinion of the Justices to the Senate, 412 Mass. 1201, 1211 (1992).⁵ Contrast Commonwealth v. Grenier, 45 Mass. App. Ct. 58, 61-62 (1998). Regardless, even if this was error, the admission of the evidence was not

⁵ In this way, we emphasize that the defendant did not explicitly refuse to take the test, but told the officer that a genuine physical ailment prevented her from performing the test.

prejudicial given that the defendant's plantar fasciitis was a central part of her defense, and this was the only instance where she mentioned her condition to the arresting officer.⁶

As for the second instance, the evidence that the defendant refused to answer booking questions, such evidence was "irrelevant and inadmissible." Commonwealth v. Gonsalves, 74 Mass. App. Ct. 910, 911 (2009). Nevertheless, its erroneous admission here did not create a substantial risk of a miscarriage of justice. The officer's testimony that the defendant "was refusing to answer anything" was elicited by defense counsel on cross-examination as part of an effort to show that the defendant was upset by her arrest. We see no risk that the judge at this jury-waived trial drew any consciousness of guilt or other impermissible inference from this testimony. The same is true of the video recorded evidence of the refusal to answer booking questions.⁷ As the judge said, in watching the video recording, he would be "able to compartmentalize some of [these] things better than a jury might . . . because [he was]

⁶ Namely, she argued that her plantar fasciitis prevented her from performing the first sobriety test to Officer Webster's satisfaction.

⁷ The defendant's brief asserts that a video recording of portions of the booking, played at trial, depicted an officer asking whether the defendant was "refusing to answer any more of [his] booking questions," and the defendant answering in the affirmative. Although the video recording itself is not before us, the Commonwealth's brief does not dispute the defendant's assertion. For present purposes we assume it to be accurate.

aware of what typically might be expected to be seen in this."

Likewise, we see no error in the Commonwealth's closing, which did not mention the defendant's refusal to answer booking questions, but merely highlighted her questionable behavior while at the police station.⁸

2. Prosecutor's questioning. Second, the defendant argues that the prosecutor erred by asking the defendant on cross-examination whether she was "saying [Officer Webster's] lying."⁹ We agree, and the Commonwealth concedes, that the question was improper. See Commonwealth v. Alphas, 430 Mass. 8, 18-19 (1999). Nonetheless, the defendant answered, "I don't know" and avoided labeling Officer Webster's testimony as true or false. Because the damage was minimized by the defendant's response,

⁸ The prosecutor stated: "[The defendant is] in the booking room, and that was some -- there was prayers and everything. I'm not touching upon the religious aspect of it, it's just the belligerence of it. That's what I'm touching upon. The officers are trying to do routine booking questions, routine booking rights, and what happens from here? She's just saying, you know, 'I love you, I love God, Amen.' She just keeps going on and on, and talking over the officers."

⁹ Commonwealth: "Okay. Now, you were saying that you were -- you didn't drink at all."

Defendant: "No."

Commonwealth: "Okay. And you also were saying that you didn't take any prescription medications, anything like that?"

Defendant: "Correct."

Commonwealth: "Okay. Now, how can you explain that there was an odor on your breath? Are you saying that the officer's lying, or how do you explain that?"

Defendant: "I don't know."

the error does not rise to a substantial risk of a miscarriage of justice. See id. at 20.

3. Prosecutor's closing argument. Finally, the defendant claims that the prosecutor committed reversible error during closing argument by implying that the defendant falsely tailored a portion of her testimony. The relevant portion of the closing argument is as follows:

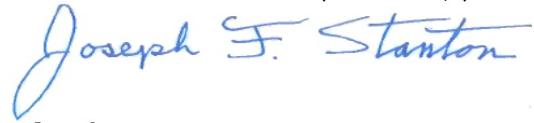
"Now, with respect to her believing, do I have to walk 12 steps or nine, I find it very interesting how she say[s] Officer Webster, who testified here in court, said that he told her it was a Nine Step Walk and Turn. That's what he said the test was. I find it interesting how she just said he's -- that the officer said just for me to go walk in a straight line. I don't think that makes much sense in conjunction with her response about the second test, the next test. She specifically stated it was a One Leg Stand Test. And I'd argue that it's clear as day that she's saying that, 'cause that benefits her in this case if it's not -- 'cause she did 12 steps. Also, in -- I mean, that's the argument with respect to credibility."

We read the somewhat disjointed statement to merely highlight a discrepancy between the testimony of the defendant and the testimony of Officer Webster. Here, the prosecutor characterizes the difference as "interesting," he "[doesn't] think [it] makes much sense," and it "benefits her." That is not an allegation of tailoring. Compare Commonwealth v. Alphonse, 87 Mass. App. Ct. 336, 338 (2015) (prosecutor's closing included: "[w]here's the Defendant when all the other evidence, all the other witnesses were coming in? Sitting right here. It's the opportunity to tailor his version of events to

what you already know"). Again, the defendant did not object at trial. See Commonwealth v. Oliviera, 74 Mass. App. Ct. 49, 56 (2009) ("the lack of an objection by defense counsel is further indication that the remark[s were] not unfairly prejudicial in tone, manner, or substance"). There was no error.¹⁰

Judgment affirmed.

By the Court (Desmond,
Sacks & Lemire, JJ.¹¹),


Clerk

Entered: July 10, 2019.

¹⁰ Even assuming there was error, given the strength of the Commonwealth's case, there was no risk of a miscarriage of justice.

¹¹ The panelists are listed in order of seniority.